BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JULIA K. KELLOGG Claimant VS. **AT&T** Respondent AND **OLD REPUBLIC INSURANCE CO.** Insurance Carrier	)	Docket No. 1,055,624

ORDER

STATEMENT OF THE CASE

All parties requested review of the April 8, 2014, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on August 5, 2014. William L. Phalen of Pittsburg, Kansas, appeared for claimant. Kelsy E. Allison of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant suffered personal injury by accident arising out of and in the course of her employment with respondent on April 5, 2011. The ALJ gave equal deference to the opinions of both Drs. Prostic and Estep, concluding claimant sustained a functional impairment of 12.5 percent to the body as a whole. The ALJ determined claimant sustained a task loss of 71 percent and was eligible for work disability benefits subsequent to her termination from respondent on December 5, 2011. The ALJ found:

> [Claimant's] wage loss was 100 percent beginning 12/5/11 and extending to 12/3/12, a period of 52 weeks. Claimant's task loss was 72 percent which averaged with her wage loss provided a permanent partial disability of 86 percent. The 52 week period was claimant's longest period during which compensation was payable.
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> Claimant had shorter periods of work disability extending from 12/03/12 until 05/03/13, a period of 21.57 weeks in which her wage loss was 12 percent providing a permanent partial disability of 41.50 percent and 14.86 weeks with a 100 percent

> wage loss and a permanent partial disability of 86 percent. Thereafter, claimant found a job . . . that paid her more than she was making with [respondent].[1]

Further, the ALJ found the issue of temporary total disability benefits raised by claimant at the regular hearing had been abandoned. The ALJ ordered respondent to provide all medical care expenses related to claimant's accident, and he determined claimant is entitled to both unauthorized medical care up to the statutory limit and future medical care upon proper application.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

In her brief, claimant argues she is entitled to a 15 percent permanent partial impairment to the body as a whole based upon the ratings of Dr. Prostic, as Dr. Estep did not perform the necessary testing to evaluate claimant's impairment, rendering his rating opinions less credible. Claimant argues the ALJ should have awarded 123.43 weeks of work disability benefits.

Respondent maintains the ALJ's Award should be vacated, as claimant's injury did not arise out of and in the course of her employment with respondent. Alternatively, respondent agrees with the ALJ's finding claimant is entitled to 52 weeks of work disability. Respondent also argues claimant is not entitled to work disability benefits for the period of April 5, 2011, to December 5, 2011, as claimant was employed by respondent at that time and not at maximum medical improvement.

The issues for the Board's review are:

1. Did claimant sustain an injury arising out of and in the course of her employment with respondent?

2. What is the nature and extent of claimant's disability?

3. Did the ALJ exceed his authority and/or jurisdiction in granting benefits to claimant?

4. Did the ALJ improperly calculate claimant's award?

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[1] ALJ Award (Apr. 8, 2014) at 5.

FINDINGS OF FACT

Claimant was employed as a customer service specialist at respondent's call center in Joplin, Missouri, under a Kansas contract of employment. In this position, claimant answered telephones and assisted customers. Claimant testified prior to April 5, 2011, she worked 40 hours per week at respondent consisting of 10 hours per day, 4 days per week. Claimant stated she was required to remain at her work station for the duration of her shift, unless she was on one of her three scheduled breaks. Claimant was "on the clock" during each break.[2]

On April 5, 2011, claimant went to the bathroom during one of her scheduled breaks. Claimant testified she was speaking to a coworker while walking to a stall when she slipped and fell, falling to the tile floor and hitting her head on both the stall door and the floor. Claimant stated a coworker witnessed the fall through the mirror and informed her she slipped on toilet paper. Claimant did not see toilet paper when she fell, nor did she see herself step on toilet paper prior to or during her fall. Claimant explained she noticed toilet paper near her feet while she was lying on the floor following the fall. Claimant experienced immediate pain in her back, right hip, right shoulder, head and neck.

Claimant reported the incident to her supervisor and was referred to Freeman OccuMed in Joplin. Claimant initially treated with Dr. Dennis Estep, a physician specializing in occupational medicine, on April 5, 2011. Claimant told Dr. Estep "she was going into the bathroom. As she was walking into it, her left leg flipped out from underneath her and she fell backwards."[3] X-rays were taken of claimant's right wrist and hip. Dr. Estep diagnosed a right hip contusion, right wrist strain, acute back spasm and neck strain. Claimant was given physical therapy for the shoulder, neck and back areas. She was prescribed pain and anti-inflammatory medications.

Claimant continued treatment with Dr. Estep through April 2011, until her medical care was denied by respondent. Claimant stated she was under physical restrictions and had not been released from treatment prior to the cancellation.

Claimant subsequently sought treatment on her own at Columbus Community Clinic. An MRI was taken of the low back revealing mild degenerative disc disease at L4-5 and L5-S1. An MRI of claimant's right shoulder revealed mild acromioclavicular joint and glenohumeral osteoarthritic sequelae. An MRI of claimant's cervical spine revealed a small bulge at C7-T1, but was not considered significant. Physical therapy was recommended, but claimant did not undergo physical therapy at that time.

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[2] Claimant's Depo. (Aug. 15, 2013) at 57.

[3] Estep Depo. at 7.

Dr. Edward Prostic, a board certified orthopedic surgeon, first examined claimant on May 17, 2011, at the request of claimant's counsel. Claimant provided a history of slipping on toilet paper in the bathroom and landing on her right hip. She complained of pain in the right low back, pain in the right hip with radiation to the posterior knee and pain about the right shoulder posteriorly and anteriorly. Dr. Prostic reviewed claimant's medical records, history, and performed a physical examination, concluding claimant's condition was most consistent with rotator cuff irritability, lumbar sprain and strain, trochanteric bursitis, and possible femoral acetabular impingement syndrome. Dr. Prostic recommended treatment with physical therapy, aerobic exercises and anti-inflammatory medication.

Claimant returned to work at respondent following the April 5, 2011, accident, but could not work full-time. Claimant testified she was unable to sit for prolonged periods of time and had pain in her shoulder and neck. Claimant indicated she daily reported her condition to her supervisor, but was not accommodated by respondent. Claimant estimated she worked approximately 11.5 hours per week following her fall. Claimant worked for respondent in this capacity until she was terminated on December 5, 2011, for attendance issues. Claimant stated she only missed work for reasons related to her injuries.

Claimant remained unemployed until December 3, 2012, when she accepted a full-time assistant teaching position. Claimant held this position until May 3, 2013. Claimant was then unemployed until August 15, 2013, when she accepted a position as a special education teacher with the Joplin School District. Claimant testified she received unemployment benefits during those periods she did not work.

Following a preliminary hearing held August 26, 2011, Dr. Estep was designated claimant's authorized treating physician by order of the ALJ. Claimant returned to Dr. Estep in September 2011, at which time he testified claimant no longer complained of right shoulder difficulty. Over the course of claimant's treatment, Dr. Estep prescribed physical therapy, epidural injections, a TENS unit and chiropractic treatments.

Dr. Estep testified that while claimant was in need of physical restrictions upon her initial return to his care, he removed the limitations several months prior to finding her at maximum medical improvement on November 7, 2012. Using the AMA *Guides*,[4] Dr. Estep opined claimant sustained a 5 percent impairment to the lumbosacral spine and a 5 percent impairment to the cervical spine, for a combined impairment of 10 percent to the body as a whole.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Prostic again evaluated claimant on December 11, 2012, at which time her primary concerns included her low back and right hip. Claimant also complained of pain about the neck with intermittent severe headaches and pain in the right shoulder with intermittent numbness of the right arm. Dr. Prostic reviewed claimant's updated history, additional medical records, took x-rays, and performed a physical examination. Dr. Prostic concluded claimant sustained chronic sprains and strains of her neck, back and right shoulder as a result of her fall on April 5, 2011. He noted in his report additional treatment was unlikely to be beneficial, and he imposed physical restrictions on claimant.[5] Dr. Prostic wrote:

> She should do only 30 pounds occasional lifting knee-to-shoulder and half that much frequently. She should minimize activities below knee height or above shoulder height. She should avoid frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment, or captive positioning.[6]

Using the AMA *Guides*, Dr. Prostic opined claimant sustained a 15 percent permanent partial impairment of the body as a whole on a functional basis as a result of the April 2011 accident. Dr. Prostic testified:

> It is my opinion that she has 5 percent of the body as a whole for the lumbar spine; 2 percent for trochanteric bursitis; 5 percent of the body as a whole for the cervical spine; and 8 percent of the right upper extremity for weakness of rotator cuff muscles.[7]

Dr. Prostic explained that while these ratings combine to an actual impairment rating of 16.5 percent, he felt 15 percent was an appropriate number for claimant's condition.

Claimant interviewed with two vocational rehabilitation consultants: Karen Terrill at her counsel's request, and Steve Benjamin at respondent's request. Both consultants generated task loss analysis reports based on the essential job tasks claimant performed in the 15-year period prior to April 5, 2011.

Dr. Prostic reviewed the report generated by Ms. Terrill dated September 18, 2013. Dr. Prostic originally agreed with Ms. Terrill's designations as to which tasks claimant could

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[5] Dr. Prostic later testified claimant will need ongoing future medical care. (Prostic Depo. at 22).

[6] Prostic Depo., Ex. 3 at 1.

[7] Prostic Depo. at 18.

perform, but later changed his opinion. Dr. Prostic determined claimant was unable to perform 25 of the 38 unduplicated tasks on the list, for a 66 percent task loss.[8]

Dr. Estep reviewed the reports generated by both Ms. Terrill and Mr. Benjamin, and he opined claimant should be able to perform all tasks on the lists. Dr. Estep testified he reviewed the task analysis reports under the assumption claimant had no restrictions. He then stated, based upon the functional capacities evaluation he ordered in 2011, he would advise claimant not to perform any tasks requiring her to lift more than 40 pounds on a regular basis.[9]

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part:

> In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2010 Supp. 44-508(g) defines "burden of proof" as follows:

> 'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

In *Kindel v. Ferco Rental, Inc.,*[10] the Kansas Supreme Court provided an analysis for determining if an injury arises out of and in the course of employment. In Kindel, the Court wrote:

> Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident

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[8] Prostic Depo. at 47. Dr. Prostic originally determined claimant sustained a 71 percent task loss. The ALJ adopted this 71 percent task loss in his April 8, 2014, Award.

[9] In his April 8, 2014, Award, the ALJ noted, "Because [Dr. Estep] did not fully evaluate claimant for a task loss, his testimony regarding this issue is found to be unreliable and was not considered as part of the award." (ALJ Award at 5).

[10] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

occurred and means the injury happened while the worker was at work in the employer's service.[11]

K.S.A. 2010 Supp. 44-508(d) and (e) state:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.
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> (e) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

ANALYSIS

1. Did claimant sustain an injury arising out of and in the course of her employment with respondent?

An injury arises out of employment if it arises out of the nature, conditions, obligations and incidents of the employment. Respondent concedes the injury occurred in the course of employment, but disputes the injury occurred arising out of employment.

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[11] *Kindel*, *supra*, at 278; citing *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 198-99, 689 P.2d 837 (1984); *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

Respondent argues claimant's injury was a personal risk and not incidental to the work she was performing. The Board disagrees.

Respondent's arguments ignore a long line of cases that deal with workers who are injured while on break and the personal comfort doctrine. In *Fratzel v. Price Chopper*,[12] an appeal of a preliminary hearing Order, a Board Member found using a restroom at work is incidental to work. The Board Member in *Fratzel* also noted work breaks benefit both the employer and employee.[13] The Board agrees. Restroom breaks are a necessary requirement for an employee to be able to perform work activities.

In a recent case before the full Board, *Swank v. Northeast Ohio Communications Network*,[14] the Board held the personal comfort doctrine continues to apply. In *Swank*, as in this case, the employee fell during a restroom break. Unlike this case, the employee in *Swank* fell in a restroom located in a common area not under the control of the employer.

Citing *Wallace v. Sitel of North America*,[15] the Board in *Swank* stated:

> A general rule given by Larson's regarding off premises coffee or rest breaks is:
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> If the employer, in all circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment.

Wallace involved an employee who was injured during a smoke break.

The Board made a similar ruling in *Roath v. ASR International Corporation*.[16] Roath went on a short break to retrieve her purse from her automobile that was in a parking lot used by ASR's employees, but not owned by ASR. Roath fell and was injured as she was

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[12] *Fratzel v. Price Chopper*, No. 1,066,540, 2014 WL 517247 (Kan. WCAB Jan. 27, 2014).

[13] *Id.*; see also *Wallace v. Sitel of North America*, No. 242,034, 1999 WL 1008023 (Kan. WCAB Oct. 28, 1999); *Jay v. Cessna Aircraft Co.*, No. 1,016,400, 2005 WL 3665488 (Kan. WCAB Dec. 14, 2005); *Vaughn v. City of Wichita,* No. 184,562, 1998 WL 100158 (Kan. WCAB Feb. 17, 1998); and *Longoria v. Wesley Rehabilitation Hospital*, No. 220,24, 1997 WL 377961 (Kan. WCAB June 9, 1997).

[14] *Swank v. Northeast Ohio Communications Network*, No. 1,064,232, 2013 WL 5521849 (Kan. WCAB Sept. 26, 2013).

[15] *Wallace, supra,* at 4.

[16] *Roath v. ASR International Corporation*, No. 1,032,944, 2008 WL 651675 (Kan. WCAB Feb. 18, 2008).

returning to the building where she worked. The Board found Roath's injuries arose out of and in the course of her employment, stating:

> In circumstances where the employee is taking a break in an area designated or permitted by the employer for such purposes, even if it is not on the employer's premises, there is also a degree of control sufficient to find the accident compensable. [Footnote citing Larson's Workers' Compensation Law § 21.02 (2006); *Riley v. Graphics Systems, Inc.*, No. 237,773, 1998 WL 921346 (Kan. WCAB Dec. 31, 1998).]

The Board finds claimant suffered an injury arising out of her employment with respondent.

2. What is the nature and extent of claimant's disability?

The ALJ found the functional impairment ratings of Drs. Prostic and Estep to be equally credible. The ALJ averaged the two impairment ratings and found claimant sustained a 12.5 percent functional impairment. At the oral argument of this appeal, the parties stipulated claimant suffers a 12.5 percent functional impairment. The 12.5 percent functional impairment pays out over a period of 51.71 weeks from the date of accident on April 5, 2011. The 51.71 week period from the date of accident ends on April 2, 2012.

Two physicians testified regarding the nature and extent of claimant's ability to work. Dr. Estep, the treating physician, released claimant without restrictions, even though a functional capacities evaluation he ordered suggested claimant had limitations. The ALJ rejected Dr. Estep's opinions in this regard because he did not fully evaluate claimant for task loss. The Board agrees. Dr. Estep's opinion claimant can perform all of the tasks listed by Mr. Benjamin and Ms. Terrill is inconsistent with his impression of the functional capacities evaluation and his statements made on cross-examination when he was asked about a task contained on Ms. Terrill's list.

The only other task loss opinion is Dr. Prostic's. Dr. Prostic opined claimant was unable to perform 25 of 38 tasks listed by Ms. Terrill, resulting in a 66 percent task loss. The Board adopts Dr. Prostic's opinion as the only credible opinion on task loss in the record.

The record supports the following relevant periods of wage loss:

Time Period	Weeks	Wage Loss	Task Loss	Work Disability
April 3, 2012 - December 3, 2012	35	100%	66%	83%
December 4, 2012 - May 3, 2013	21.57	12%	66%	39%
May 4, 2013 - August 15, 2013	14.86	100%	66%	83%
August 16, 2013 - Present		0%		

The Board's method of calculating an award when either the functional impairment or work disability changes is to calculate the award, or recalculate if benefits have already been paid, based on the differing disability rating. Using the new or latest disability rate, as though no permanent partial benefits had been paid or were payable under any earlier disability rate, the maximum entitlement is recalculated and applied throughout the duration of that disability rate. Payments made or due prior to the application of the most current disability rate are credited to the total due under the new rate.

Based upon a 66 percent task loss and the wage loss noted above, claimant suffered an 83 percent work disability from April 3, 2012, to December 3, 2012, a 39 percent work disability from December 4, 2012, to May 3, 2013, and an 83 percent work disability from May 4, 2013, to August 15, 2013. Since August 15, 2013, claimant has earned a comparable wage and is not entitled to permanent partial general disability.

3. Did the ALJ exceed his authority and/or jurisdiction in granting benefits to claimant?

Administrative law judges have the authority to award or deny compensation pursuant to K.S.A. 2010 Supp. 44-523(c) and K.S.A. 2010 Supp. 44-551(l)(1). The ALJ did not exceed his authority in granting benefits to claimant.

4. Did the ALJ improperly calculate claimant's award?

Both parties dispute the method with which the award was calculated. The Board agrees. The permanent partial disability computations must be modified to comply with K.S.A. 2010 Supp. 44-510e and applicable case law.[17]

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[17] See *Wheeler v. Boeing Co.*, 25 Kan. App. 2d 632, 967 P.2d 1085 (1998), *rev. denied* 266 Kan. 1116 (1999); *Gallagher v. Keesecker Agri Business, Inc*, No. 1,053,366, 2014 WL 3886808 (Kan. WCAB July 31, 2014); *Childres v. Via Christi*, No. 1,045,369, 2013 WL 5983241 (Kan WCAB Oct. 29, 2013); *Rivera-Garay v. McCrite Plaza Retirement Community*, No. 1,000,191, 2010 WL 517308 (WCAB Jan. 29, 2010); *Juett v. State of Kansas*, Nos. 241,926, 1,034,321 & 1,042,037, 2012 WL 369763 (Kan. WCAB Jan 10, 2012); *Bell v. Boeing Company*, No. 239,082, 2003 WL 1918538 (Kan. WCAB Mar. 31, 2003).

Respondent argues claimant is not entitled to benefits from the date of accident through December 3, 2012, when claimant was terminated. The Board agrees. However, claimant is entitled to functional impairment benefits during that period. Claimant's functional impairment benefits end on April 3, 2012.

Claimant is entitled to compensation for functional impairment from the date of accident to April 2, 2012, 51.71 weeks at the rate of $394.64, which is $20,406.83. Claimant is entitled to compensation for an 83 percent work disability from April 3, 2012, to December 3, 2012, 35 weeks at the rate of $394.64, which is $13,812.40. Claimant is entitled to compensation for a 39 percent work disability from December 4, 2012, to May 3, 2013, 21.57 weeks at the rate of $394.64, which is $8,512.38. Claimant is entitled to an 83 percent work disability from May 4, 2013, to August 15, 2013, 14.86 weeks at the rate of $394.64, which is $5,864.35. Based upon claimant's current comparable wage, no compensation is due after August 15, 2013.

CONCLUSION

Claimant suffered a compensable injury arising out of and in the course of her employment with respondent on April 5, 2011. Claimant suffered a 12.5 percent functional impairment from the date of accident through April 2, 2012, an 83 percent work disability from April 3, 2012, to December 3, 2012, a 39 percent work disability from December 4, 2012, to May 3, 2013, and an 83 percent work disability from May 4, 2013, to August 15, 2013. No permanent disability compensation is due after August 15, 2013. The ALJ did not exceed his authority in granting compensation to claimant. The ALJ erred in calculating the award.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated April 8, 2014, is modified.

Claimant is entitled to compensation for her 12.5 percent functional impairment from the date of accident to April 2, 2012, 51.71 weeks at the rate of $394.64, which is $20,406.83. Claimant is entitled to compensation for an 83 percent work disability from April 3, 2012, to December 3, 2012, 35 weeks at the rate of $394.64, which is $13,812.40. Claimant is entitled to compensation for a 39 percent work disability from December 4, 2012, to May 3, 2013, 21.57 weeks at the rate of $394.64, which is $8,512.38. Claimant is entitled to an 83 percent work disability from May 4, 2013, to August 15, 2013, 14.86 weeks at the rate of 394.64, which is $5,864.35. No compensation is due after August 15, 2013.

Combining the numbers above, claimant is entitled to 123.43 weeks of functional impairment and permanent partial general disability at the rate of $394.64 per week for a total award of $48,595.96. As of September 12, 2014, all amounts are due and owing and

ordered paid in one lump sum, less amounts previously paid. The Award of the ALJ is affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of September 2014.

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BOARD MEMBER

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BOARD MEMBER

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